UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/CN.4/2002/137
26 February 2002

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Fifty-eighth session
Item 11 (a) of the provisional agenda

CIVIL AND POLITICAL RIGHTS INCLUDING THE QUESTIONS OF TORTURE AND DETENTION

Report of the newly appointed Special Rapporteur on torture, Mr. Theo van Boven

CONTENTS

	Paragraphs	Page
Introduction	1 - 2	2
I. MANDATE AND METHODS OF WORK	3 - 15	2
II. ACTIVITIES OF THE SPECIAL RAPPORTEUR	16 - 19	6

Annex: Message by 17 independent experts of the Commission on Human Rights on the occasion of Human Rights Day, 12 December 2001

* The annex is reproduced in the original language only.

GE.02-10994 (E) 040302

Introduction

1. The mandate of the Special Rapporteur on torture, assigned since April 1993 to Sir Nigel Rodley (United Kingdom), was renewed for three more years by the Commission on Human Rights in its resolution 2001/62. By letter dated 15 October 2001, Sir Nigel submitted to the Chair of the fifty-seventh session of the Commission his resignation as Special Rapporteur, to take effect as from 12 November 2001.[1] By letter dated 28 November 2001, the Chair, after consultations with the Bureau, appointed Theo van Boven (The Netherlands) as Special Rapporteur on torture.

2. In conformity with resolution 2001/62, the newly appointed Special Rapporteur hereby presents his first report to the Commission. The present report, brief in scope and content, reflects the early activities of the new Special Rapporteur in accordance with the mandate entrusted to him. It is issued in addition to the documents submitted by his predecessor (E/CN.4/2002/76 and Add.1).

I. MANDATE AND METHODS OF WORK

3. The Special Rapporteur adheres to the principle of continuity in the discharge of the mandate conferred to him in accordance with the relevant resolutions of the Commission on Human Rights. Thus, he continues to be guided by the methods of work described in the annex to document E/CN.4/1997/7 which have been approved most recently by the Commission in resolution 2001/62 (para. 30).

4. The main activities of the Special Rapporteur continue to be:

(a) Seeking and receiving credible and reliable information from Governments, the specialized agencies and intergovernmental and non-governmental organizations;

(b) Making urgent appeals to Governments to clarify the situation of individuals whose circumstances give grounds to fear that treatment falling within the Special Rapporteur's mandate might occur or to be occurring;

(c) Transmitting to Governments information of the sort mentioned in (a) above indicating that acts falling within his mandate may have occurred or that legal or administrative measures are needed to prevent the occurrence of such acts;

(d) Carrying out visits in situ with the consent of the Government concerned.

5. In particular, the Special Rapporteur has continued at the outset to seek cooperation from holders of other Commission mandates, with a view to arriving at concerted action and avoiding duplication of activity in respect of country-specific initiatives. Similarly, the Special Rapporteur intends to continue cooperating with human rights mechanisms particularly

relevant to his mandate, such as the Committee against Torture, the Human Rights Committee, the Board of Trustees of the United Nations Voluntary Fund for Victims of Torture and the Commission on Crime Prevention and Criminal Justice. In this respect, he is mindful of the complementary nature of the mandates and activities of the various bodies that combat practices of torture and that provide redress and rehabilitation to torture victims.

6. The Special Rapporteur intends to pay particular attention to follow-up activities which are indispensable in any human rights promotion and protection system. He believes that such follow-up activities with respect to individual cases and specific situations (urgent appeals and allegations) and recommendations of a general nature or made in relation to visits in situ are crucial, in particular in order to make the activities under his mandate more effective. The Special Rapporteur notes that, owing to a lack of resources, such activities have in the past not reached the level that is needed. He therefore hopes that, in the future, sufficient resources will become available to meet the essential requirements of his mandate. It is evident that in all circumstances the effective cooperation of States is a necessary condition for the successful implementation of the mandate.

7. The Special Rapporteur would like to use this occasion to associate himself fully with the recommendations his predecessor included in his last report to the General Assembly (A/56/156, para. 39). He expresses the profound hope that States and other interested national and international actors will examine the 12 recommendations carefully and make every effort to follow them up and implement them.

The non-derogability of the prohibition of torture and cruel, inhuman or degrading treatment or punishment

8. In submitting his first report to the Commission, the Special Rapporteur deems it necessary to underline one particular aspect of the prohibition of torture and cruel, inhuman and degrading treatment or punishment, namely, the non-derogable nature of this prohibition. It may be argued that putting emphasis on this issue is to state the obvious and that it is too well-known to all who are familiar with the precepts and principles of international human rights and humanitarian law to reiterate. Nevertheless, at a time when in the name of upholding and defending national and international security interests, the enjoyment of human rights and fundamental freedoms risks being subject to erosion, it is not redundant to recapture and reaffirm the basics of human rights protection and notably to re-emphasize that certain rights cannot be derogated from under any circumstances, including in times of public emergency. This concern was also a constituent element of the statement issued on the Human Rights Day (10 December 2001) by 17 independent experts of the Commission on Human Rights.[2]

9. The 1966 International Covenant on Civil and Political Rights consecrates the imperative and non-derogable nature of the prohibition of torture and other forms of ill-treatment by not allowing any derogation from article 7 (prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent), even in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed.[3] In that respect, the Special Rapporteur draws the Commission's attention to the close interconnection of certain provisions of the Covenant that have a bearing on the scope of the principle of non-derogability. Thus, the Human Rights Committee's General Comment

No. 29 on derogations from the provisions of the Covenant during a state of emergency states that "[i]n those provisions of the Covenant that are not listed in article 4, paragraph 2, there are elements that in the Committee's opinion cannot be made subject to lawful derogation under article 4". Among the illustrative examples presented, it is stated by the Human Rights Committee that: "(a) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Although this right, prescribed in article 10 of the Covenant, is not separately mentioned in the list of non-derogable rights in article 4, paragraph 2, the Committee believes that here the Covenant expresses a norm of general international law not subject to derogation. This is supported by the reference to the inherent dignity of the human person in the preamble to the Covenant and by the close connection between articles 7 and 10."

10. With no significant variations in wording, the three human rights instruments of regional applicability, the 1950 European Convention on Human Rights, the 1969 American Convention on Human Rights and the 1981 African Charter on Human and Peoples' Rights, prohibit torture and other forms of ill-treatment in terms similar to those of article 7 of the International Covenant on Civil and Political Rights. In the case of the European and American Conventions, a parallel with the Covenant is also maintained with regard to the non-permissibility of derogations from the prohibition.

11. The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly resolution 3452 (XXX) of 9 December 1975, similarly provides that "[n]o State may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment".[4] A similar provision is restated in article 2, paragraph 2 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[5]

12. International humanitarian law affirms the same basic notions. With respect to prisoners of war, the 1949 Geneva Convention relative to the Treatment of Prisoners of War (the Third Geneva Convention) provides that "[p]risoners of war must **at all times** be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention .... Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity. Measures of reprisal against prisoners of war are prohibited"[6] and that "[p]risoners of war are entitled **in all circumstances** to respect for their persons and their honour."[7] With respect to interrogation, the Third Geneva Convention further provides that "[n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind."[8] Furthermore, it must be noted that, according to article 130 of the Third Geneva Convention, acts of "torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health" against persons protected by the Convention are considered as grave breaches of the Convention, requiring the High Contracting Parties to take specific legal and

enforcement measures in the area of criminal law and procedure. A similar provision is included in article 147 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention). Moreover, the 1977 Protocol Additional to the Geneva Conventions relative to the Protection of Victims of International Armed Conflicts (Protocol I) prescribes amongst fundamental guarantees that "persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely **in all circumstances**".[9] Furthermore, among the acts which "are and shall remain prohibited **at any time and any place whatsoever**, whether committed by civilian or be military agents", are listed: "(a) violence to the life, health, or physical or mental well-being of persons, in particular: (i) murder; (ii) torture of all kinds, whether physical or mental; (iii) corporal punishment; and (iv) mutilation; (b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault; … (d) collective punishments; and (e) threats to commit any of the foregoing acts."[10]

13. With respect to non-international armed conflicts, the Special Rapporteur draws the attention of the Commission in particular to common article 3 of the 1949 Geneva Conventions, which has sometimes been described as a "mini-convention" in itself. Common article 3 provides that "[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall **in all circumstances** be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited **at any time and in any place whatsoever** with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; … (c) outrages upon personal dignity, in particular, humiliating and degrading treatment" (emphasis added). Further, the 1977 Protocol Additional to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) provides amongst fundamental guarantees that "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall **in all circumstances** be treated humanely, without any adverse distinction. … the following acts against the persons referred to [above] are and shall remain prohibited **at any time and in any place whatsoever**: (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) collective punishments; … (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; … (h) threats to commit any of the foregoing acts".[11]

14. In addition, the Special Rapporteur would like to underline the link between the non-derogable nature of the prohibition of torture and other forms of ill-treatment and the principle of *non-refoulement*. The Human Rights Committee, in its General Comment 20 on article 7 of the 1966 International Covenant on Civil and Political Rights, has stated that State Parties "must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of extradition, expulsion or *refoulement*".

Similarly, article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that "[n]o State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture". It is submitted that the principle contained in the Human Rights Committee's statement and the above provision of the Convention against Torture represents an inherent part of the overall fundamental obligation to avoid contributing in any way to a violation of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. It must be emphasized that the protection offered by the principle of *non-refoulement* is of an imperative nature. In this regard, the Special Rapporteur notes the findings of the Committee against Torture to the effect that "the nature of the activities in which the person engaged is not a relevant consideration in the taking of a decision in accordance with article 3 of the Convention"[12] and that article 3 applies "irrespective of whether the individual concerned has committed crimes and the seriousness of those crimes".[13]

15. This review of the non-derogability of the prohibition of torture and cruel, inhuman or degrading treatment or punishment can no better be summed up than by quoting the following repeated and unambiguous pronouncement of the Commission: "*condemns* all forms of torture and other cruel, inhuman or degrading treatment or punishment, which can never be justified under any circumstances whatsoever".[14] The Special Rapporteur concludes that the legal and moral basis for the prohibition of torture and other cruel, inhuman or degrading treatment or punishment is absolute and imperative and must under no circumstances yield or be subordinated to other interests, policies and practices.

II. ACTIVITIES OF THE SPECIAL RAPPORTEUR

16. The Special Rapporteur continues, like his predecessor, to receive information concerning the situation of individuals who are reportedly at risk of being tortured or being subjected to other forms of ill-treatment. Since his appointment, the Special Rapporteur has followed the established practice of sending, either in his own name or in appropriate cases jointly with other holders of Commission mandates, urgent appeals seeking clarification of the situation of the persons concerned and requesting the authorities to take the necessary measures to ensure that the persons concerned are treated humanely.

17. With respect to requests for visits in situ, the Special Rapporteur, taking into account requests made earlier by his predecessor, expressed in letters dated 25 January 2002 his interest in undertaking such visits, within the framework of his mandate, to the following countries: Algeria, Egypt, Georgia, India, Indonesia, Israel, Nepal, the Russian Federation with respect to the Republic of Chechnya, Tunisia and Uzbekistan. He also responded with interest to invitations received by his predecessor from the Governments of Bolivia, Equatorial Guinea and Togo, as well as the invitation reiterated to him by the Government of China.

18. In paragraph 9 of its resolution 2001/62, the Commission on Human Rights requested the Special Rapporteur to study the situation of trade and production in equipment which is specifically designed to inflict torture or other cruel, inhuman or degrading treatment, its origin, destination and forms, with a view to finding the best ways to prohibit such trade and production and to combat its proliferation, and report thereon to the Commission. Accordingly, on

7 August 2001, a note verbale was sent by the Secretariat to all Permanent Missions to the United Nations Office at Geneva, to international organizations and to relevant intergovernmental and non governmental organizations. At the time of writing, information and comments have been received from the following Governments: Argentina, Bahrain, Belarus, Colombia, Cuba, and Tunisia; as well as from the following non-governmental organizations: Amnesty International and the Omega Foundation. The Special Rapporteur is fully aware of the importance of the study requested. He believes that further information is needed to allow him to carry out this study effectively. In this regard, it is relevant to note that the first Special Rapporteur on torture, Peter Kooijmans, in his first report to the Commission on Human Rights recognized that numerous countries produce and export instruments specifically designed to inflict torture.[15] The Special Rapporteur would welcome further information on this issue from governmental and non-governmental sources.

19. On 22 January 2002, the Special Rapporteur addressed the fifty-eighth session of the pre-sessional open-ended working group on the question of a draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Notes

[1] The summary of activities carried out by the Special Rapporteur in 2000 and of communications sent by the Special Rapporteur from 15 December 2000 to 12 November 2001, the date of his resignation from the mandate, and replies received thereto from Governments from 15 December 2000 to 1 December 2001 may be found in documents E/CN.4/2002/76 and E/CN.4/2002/76/Add.1.

[2] For ease of reference, annex I to this report reproduces the press release issued on 10 December 2001 by 17 independent experts.

[3] Article 4.

[4] Article 3.

[5] Article 2, paragraph 2 reads as follows: "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture".

[6] Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949, article 13 (emphasis added).

[7] Ibid., article 14 (emphasis added).

[8] Ibid., article 17.

[9] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, article 75 (emphasis added).

[10] Ibid.

[11] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, article 4 (emphasis added).

[12] Seid Mortesa Aemei v Switzerland (Communication No. 34/1995, 9 May 1997), paragraph 9.8.

[13] M.B. B. v Sweden (Communication No. 104/1998, 5 May 1999), paragraph 6.4.

[14] See, inter alia, Commission resolution 2001/62, paragraph 1.

[15] See E/CN.4/1986/15, paragraphs 120-121.

Annex

MESSAGE BY 17 INDEPENDENT EXPERTS OF THE COMMISSION ON HUMAN RIGHTS ON THE OCCASION OF HUMAN RIGHTS DAY, 10 DECEMBER 2001

Human Rights Day: Independent experts remind States of their obligation to uphold fundamental freedoms

"On the occasion of the United Nations Human Rights Day, the undersigned independent experts of the Commission on Human Rights strongly remind States of their obligation under international law to uphold human rights and fundamental freedoms in the context of the aftermath of the tragic events of 11 September 2001.

"We express our deep concern over the adoption or contemplation of anti-terrorist and national security legislation and other measures that may infringe upon the enjoyment by all of human rights and fundamental freedoms. We deplore human rights violations and measures that have particularly targeted groups such as human rights defenders, migrants, asylum-seekers and refugees, religious and ethnic minorities, political activists and the media. Concerned authorities have already been requested to take appropriate actions to guarantee the respect for human rights and fundamental freedoms in a number of individual cases drawn to the attention of relevant independent experts. We shall continue to monitor the situation closely.

"We remind States of the fundamental principle of non-discrimination which guarantees that everyone is entitled to all rights and freedoms 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status' (article 2 of the Universal Declaration on Human Rights). We also remind States that under international human rights law some rights cannot be derogated from under any circumstances, including in times of public emergency. These include: the right to life, the prohibition of torture or cruel, inhuman or degrading treatment or punishment, freedom of thought, conscience and religion, as well as the principles of precision and non-retroactivity of criminal law except where a later law imposes a lighter penalty. Furthermore, we call upon States to take appropriate measures to uphold respect for fundamental rights such as the right to liberty and security of person, the right to be free from arbitrary arrest, the presumption of innocence, the right to a fair trial, the right to freedom of opinion, expression and assembly, and the right to seek asylum.

"We call upon States to limit the measures taken to the extent strictly required by the exigencies of the situation. Public policies must strike a fair balance between on the one hand the enjoyment of human rights and fundamental freedoms by all and on the other hand legitimate concerns over national and international security. The fight against terrorism must not result in violations of human rights as guaranteed under international law."